

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Maxwell v. British Columbia*,  
2013 BCSC 1386

Date: 20130801  
Docket: S120764  
Registry: Vancouver

Between:

**Beverley Maxwell**

Plaintiff

And

**Her Majesty The Queen In Right Of The Province of British Columbia and  
British Columbia College Of Teachers**

Defendants

Before: The Honourable Mr. Justice Skolrood

## **Reasons for Judgment**

Counsel for Plaintiff:

B. Curtis

Counsel for Defendants:

A. Dalmyn

Place and Date of Trial:

Vancouver, B.C.  
June 26 & 27, 2013

Place and Date of Judgment:

Vancouver, B.C.  
August 1, 2013

**INTRODUCTION**

[1] The plaintiff, Beverley Maxwell, seeks payment of a contractual severance amount and related benefits in connection with her dismissal from the position of director of certification with the former British Columbia College of Teachers (“the College”) where she was employed from 1996 to January 2012. Alternatively, she seeks damages at common law for her termination without reasonable notice.

[2] Prior to January 2012, the College was the body responsible for regulating the teaching profession in British Columbia. Effective January 9, 2012, the College was dissolved and replaced by the new Teacher Regulation Branch (“TRB”), an agency of the provincial government, pursuant to the *Teacher’s Act*, S.B.C. 2011, c.19. That dissolution brought about the termination of the College’s employees, including Ms. Maxwell. As will be set out in more detail below, Ms. Maxwell and other College employees were offered employment with the TRB but Ms. Maxwell declined that offer.

[3] This action is concerned with the compensation payable to Ms. Maxwell as a result of her termination of employment with the College.

**THE DEFENDANTS’ OBJECTION TO PROCEEDING BY SUMMARY TRIAL**

[4] Ms. Maxwell’s notice of civil claim was filed on February 1, 2012 and the defendants’ responses on February 24, 2012. On March 15, 2013, Ms. Maxwell filed a summary trial application pursuant to R. 9-7 of the *Supreme Court Civil Rules*. The defendants’ application response was filed on May 17, 2013. In the response, the defendants raised their opposition to the matter proceeding by summary trial. Counsel for the defendants raised a similar objection in correspondence exchanged with counsel for Ms. Maxwell dating back to January 2013.

[5] However, the defendants did not bring a formal application under R. 9-7(11) to dismiss the summary trial application as being unsuitable until June 20, 2013, six days before the scheduled hearing of the summary trial application.

[6] Notwithstanding the late filing of the defendants' application, and Ms. Maxwell's objection to the application on that ground, I agreed to hear the defendants' application.

[7] Counsel for the defendants took the position that certain factual issues relevant to the determination of Ms. Maxwell's claims would more fairly and appropriately be canvassed at a conventional trial. In his submission, there are conflicting facts in the affidavit material about when Ms. Maxwell learned that her employment would be terminated. In addition, Ms. Maxwell's subjective reasons for declining employment with the TRB are relevant to the potential mitigation issue and warrant a more thorough examination at trial.

[8] In response, counsel for Ms. Maxwell took the position that the matter is appropriate for determination by way of summary trial. In his submission, any conflicts in the evidence are minor and can be resolved by reference to other evidence.

[9] In the end, I declined to grant the defendants' motion to dismiss Ms. Maxwell's summary trial application on a preliminary basis and directed that the summary trial proceed. In doing so, I reserved the right to revisit the issue and to consider whether in fact a summary trial was appropriate once I had reviewed all of the materials filed on the application and had heard counsel's full submissions.

[10] Having done so, I am satisfied that this matter can be resolved by way of summary trial and that I can determine the necessary facts on the evidence before me so as to be able to determine Ms. Maxwell's claims.

### **SUMMARY OF RELEVANT FACTS**

#### **The Plaintiff**

[11] Ms. Maxwell is currently 60 years old.

[12] She commenced her employment with the College in 1996 as an evaluator, responsible for evaluating applications for teacher certification. In November 1996

she was appointed acting director of certification which position became permanent in June 2007.

[13] At the time of termination, Ms. Maxwell was paid an annual salary of \$135,500. In addition she was a member of the Teacher's Pension Plan (the "Pension Plan") and was entitled to various health and welfare benefits provided by the College.

### **The Plaintiff's Contract of Employment**

[14] In conjunction with her appointment as the director of certification, Ms. Maxwell signed a written contract of employment with the College dated July 13, 2007. That initial contract was subsequently replaced by a written contract of employment dated December 7, 2010 which was the contract of employment in place at the date of Ms. Maxwell's termination (the "Contract").

[15] In her role as director of certification, Ms. Maxwell was a member of the College's management team. She reported directly to the registrar who was the College's senior employee. She had a staff of 16 people who reported to her and she was responsible for managing that staff.

[16] The Contract contained the following provisions that are material to the issues raised in this proceeding:

#### 1.01 Term

The employment of the Employee in the capacity of Director, Certification will continue from the date of execution of this Agreement until termination by either party pursuant to Article 1.02 (the "Term").

#### 1.02 Termination

- a) This agreement may be terminated at any time by mutual agreement of the Parties.
- b) The Employee shall be entitled to terminate this agreement upon one (1) month written notice to the College.
- c) The Registrar, shall be entitled to terminate the Employee for cause without notice or pay in lieu of notice, provided that the Employee has been given reasonable notice in writing in advance of the possible termination decision and the reasons for the possible termination and

has been provided with an opportunity to respond before a decision to terminate is made.

- d) The Registrar shall be entitled to terminate the Employee without cause provided that the Employee has been given reasonable notice in writing in advance of the possible termination decision and the reasons for the possible termination and has been provided with an opportunity for the Employee to make representations before a decision to terminate is made. The Employee may be accompanied by a representative at any meetings held with the Employer related to the possible termination.
- e) If the Registrar makes a decision to terminate the employment of the Employee without cause, the College shall provide an all-inclusive payment in lieu of notice, based upon the employee's salary and the College's cost of the benefits (which includes the College's cost of pension contributions) that would have been provided to the Employee during the period of notice of the Employee at the time of termination. The payment will occur as follows:
  - i. If the Employee is terminated at any time within the first four years of employment, the Employee shall be paid a lump-sum equivalent of four months' salary and the College's cost of the benefits (which includes the College's cost of pension contributions) that would have been provided to the Employee during the period of notice;
  - ii. If the Employee is terminated at any time after four years of employment, the Employee shall be entitled to a lump-sum payment equivalent to one (1) month salary and the College's cost of the benefits (which includes the College's cost of pension contributions) that would have been provided to the Employee during the period of notice for each completed year of service up to nine (9) years of employment, plus two (2) additional months of salary and the College's cost of the benefits (which includes the College's cost of pension contributions) that would have been provided to the Employee during the period of notice for each additional year of employment completed after nine (9) years. In addition, the Employee will receive a further additional month of salary and the College's cost of benefits (which includes the College's cost of pension contributions) for each full year, or part year, the Employee is over 50 years of age.
  - iii. The total payment under provision 1.02(e) (ii) shall not exceed 24 months of salary and the College's cost of benefits (which includes the College's cost of pension contributions).
  - iv. The Employee agrees that the lump sum to be paid represents a genuine pre-estimate of damages for early termination of this Agreement and that such sum is not a penalty.

[17] Ms. Maxwell deposes that the termination provisions in the Contract differed from the termination provisions in her previous 2007 employment contract in that the former purported to give the power to terminate the employment contract to the council of the College, which was the College's governing body. According to Ms. Maxwell, she was advised by Mr. Kit Kreiger, the then registrar of the College, that the termination power in fact rested with the registrar and that the Contract was being amended accordingly.

**Bill 12 - The Teachers Act**

[18] Ms. Maxwell deposes that in or about September 2011, she became aware that the provincial Ministry of Education was drafting legislation with the intention of discontinuing the College and absorbing the functions of the College into the Ministry. She further deposes that in or about September or October 2011, she was provided with a copy of the draft Bill and that she participated in a conference call with government representatives at which time she expressed reservations about the draft legislation.

[19] Specifically, she expressed concern about the manner in which the fitness of teacher candidates would be assessed under the new system and the role of the director of certification in that process.

[20] The Bill was formally introduced into the legislature on October 26, 2011. It was subsequently passed on November 1, 2011 and received Royal Assent on November 14, 2011 as the new *Teachers Act* (the "*Act*"). Certain sections of the *Act* came into force on Royal Assent but the majority of the sections, including s. 87 which dissolved the College, came into force on January 9, 2012 by way of B.C. Reg. 239/11 enacted December 14, 2011.

[21] In addition to dissolving the College, s. 87 provides that "all of the debts, liabilities, and obligations of the College of Teachers are transferred to and assumed by the government." Accordingly, any amounts determined to be owing to Ms. Maxwell as a result of her termination are the responsibility of the defendant Crown.

[22] The *Act* also removed Mr. Kreiger as registrar of the College effective on or about November 14, 2011. Mr. Kreiger was replaced by Susan Kennedy. Ms. Kennedy deposes that she was appointed by the Minister of Education in November 2011 to be the interim registrar of the College and to assist in the transition of the College's functions into government.

[23] Ms. Kennedy further deposes that her role was to "manage and administer the College until it was dissolved, to manage the new [TRB] of the Ministry of Education in its transition from the College, and to support the employees of the College as they took up duties in the [TRB]."

[24] Ms. Kennedy goes on to say in her affidavit that:

During that transition period, the government determined the new *Act* was to take effect on January 9, 2012, dissolving the College. As soon as that date was communicated to me, I immediately ensured that Ms. Maxwell and other College employees were made aware of it. I also told all the employees of the College that the BC Public Service Agency (the "PSA"), the Human Resources agency for the province, was working on a transition plan for all employees except Kit Kreiger, and that the government would present College employees with offers of employment.

#### **The Offer of Employment With TRB**

[25] On December 1, 2011, Ms. Maxwell received a written offer of employment from the Ministry of Education for employment with the new TRB. The offer was set out in a letter addressed to her from James Gorman, the Deputy Minister of Education, and was presented in a meeting between Ms. Maxwell and Mr. Gorman. Mr. Gorman's letter contains the following paragraph:

It is my pleasure to offer you regular employment with the Ministry of Education as Director, Certification, Strategic Leadership, pursuant to the *Public Service Act* and the *Public Service Labour Relations Act*. This offer is effective January 9, 2012, subject to the bringing into force of the new Teachers Act by the Lieutenant Governor in Council on this date.

[26] Ms. Maxwell deposes that, on receiving the offer, she wanted confirmation that the position she was being offered was the director of certification under the

new legislative scheme. She received that confirmation from Ms. Kennedy by email on December 1, 2011.

[27] She goes on to depose that she had a number of serious concerns about the proposed new position, including the fact that her salary would be reduced after two years to conform to public service salary classifications, her vacation entitlement would be reduced, her entitlement to certain discretionary days off with the College would be eliminated and her contractual entitlement to 24 months' severance would be eliminated and replaced with the statutory maximum for public service employees of 18 months.

[28] Ms. Maxwell drafted a response letter to Mr. Gorman dated December 12, 2011 in which she declined the offer of employment. That letter reads as follows in its entirety:

I thank you for your letter dated December 1, 2011. I return it with this, signed to indicate that I will not accept this position.

There are a number of good and important reasons for this. I will outline some of them.

This position is a demotion in a number of ways. The red circling of my salary for only two years does not coincide with my career goals as a long service and loyal employee of the College.

The reduction of my holiday allowance and the lack of discretionary days will not suffice for me due to the high pace of my work.

The reduced severance allowance and the pension issues are not things I can consider accepting at this point in my career.

I will miss my colleagues and my work at the College, and I leave my best wishes to everyone.

[29] Ms. Maxwell delivered her response letter to Ms. Kennedy on the morning of December 12, 2011. She deposes that Ms. Kennedy did not open the letter but Ms. Maxwell advised her that she was declining the offer. A discussion then ensued about various matters including what Ms. Maxwell would tell her staff and who might be a suitable candidate for the director of certification position in her place.

[30] According to Ms. Maxwell, Ms. Kennedy then said "your last day is January 6."

[31] Ms. Kennedy's version of events at the December 12 meeting is set out in her affidavit where she says:

When Ms. Maxwell told me that she was not accepting the offer of employment, I asked her if she was planning to stay on during the transition until the College was dissolved. We were both fully aware that the date of dissolution had been set as Monday, January 9, 2012. With that date in mind, I suggested that her last day of work at the College would be Friday, January 6, 2012. She agreed. I did not terminate the plaintiff's employment with the College or the government, or refuse to employ her.

[32] Counsel for Ms. Maxwell points out that Ms. Kennedy's evidence in her affidavit is somewhat at odds with what she said on examination for discovery. In her examination, the following exchange took place:

- Q. I understand that in the meeting you had with Ms. Maxwell there was a discussion of training Mr. McMullin. And, in fact, I understand that you asked Ms. Maxwell, "Can you train Mr. McMullin, because your last day will be January 6?" Do you remember that statement, or question, I suppose it is?
- A. I don't remember that precise language that I would have used.

### **ISSUES**

[33] The following issues arise in this proceeding:

1. Was Ms. Maxwell's employment with the College terminated by Ms. Kennedy at the December 12, 2011 meeting or by reason of the dissolution of the College pursuant to the terms of the *Act*?
2. If Ms. Maxwell's employment was terminated by reason of the dissolution of the College pursuant to the terms of the *Act*, is she nonetheless entitled to the severance payment and related benefits set out in the Contract?
3. If Ms. Maxwell is not entitled to the severance payment and related benefits set out in the Contract, what is she entitled to at common law? and
4. Was Ms. Maxwell required to mitigate her damages and, if so, did she fail to do so?

**TERMINATION OF THE PLAINTIFF'S EMPLOYMENT**

[34] Ms. Maxwell argues that her employment with the College was terminated by Ms. Kennedy at the December 12, 2011 meeting in advance of, and independent from, the termination that would have inevitably occurred when the dissolution of the College was effected by the legislation. She submits that Ms. Kennedy's directive that her last day of work would be January 6, 2012 was a clear statement of intention to terminate her employment at that date.

[35] As noted above, there is some uncertainty in the evidence about precisely what was said by Ms. Kennedy at the December 12 meeting. In my view, it is not necessary to resolve that question because I find that by December 12, employees of the College, including Ms. Maxwell, had been given notice that the College was going to be dissolved and that their employment with the College would be terminated as a result.

[36] As set out above, Ms. Kennedy deposes that once the government decided that the legislation dissolving the College would be brought into force effective January 9, 2012, she made that date known to employees of the College, including Ms. Maxwell, and further let them know that offers of employment with the new entity would be forthcoming. Ms. Maxwell does not dispute that evidence.

[37] Ms. Maxwell's offer of employment was received on December 1, 2011 and she clearly had it in hand by the December 12 meeting.

[38] Further, in her written response declining the offer, which she delivered to Ms. Kennedy at the December 12, 2011 meeting, Ms. Maxwell made it clear that she understood that her employment with the College was ending. Again, she says in her letter: "I will miss my colleagues and my work at the College, and I leave my best wishes to everyone."

[39] Counsel for Ms. Maxwell notes that the offer of employment, on its face, is subject to the provisions of the *Act* dissolving the College coming into force. In his submission, that proviso meant that there was no certainty that in fact the College

would be dissolved on January 9 and, absent such certainty, no effective notice at law was given to Ms. Maxwell.

[40] In my view, the authorities do not require the degree of certainty advanced by Ms. Maxwell.

[41] While the requirement that notice of termination be clear and unequivocal is well established, whether that test is met will depend on the circumstances of each case. In *Gibb v. Novacorp International Consulting Inc.* (1990), 48 B.C.L.R. (2d) 28 (C.A.) at 34, Mr. Justice Wood (dissenting, but not on this issue) described the requirement in these terms:

I do not think that in order to be specific and unequivocal, the notice given must necessarily use the words “you are hereby dismissed effective...” or some such equivalent. If the words used are such as would lead a reasonable person to the clear understanding that his employment is at an end as of some date certain in the future, it may well be that specific, unequivocal notice has been clearly communicated. It must in every case depend on all of the circumstances in evidence.

[42] In Geoffrey England et al, *Employment Law in Canada*, 4<sup>th</sup> ed., vol. 2 (Markham, Ont., LexisNexis, 2005) at 14-52, the authors state that “[t]he policy [of requiring specific, unequivocal, and clearly communicated notice] is to ensure that the employee has clear foreknowledge of exactly when his or her work is to end so that he or she can make the necessary preparations.”

[43] Applying these principles to the circumstances of this case, I find that by December 12, 2011 Ms. Maxwell was well aware that her employment with the College was coming to an end on the basis that the College was going to be dissolved. It was well known that the expected date of dissolution was January 9, 2012 and while it might be said that the date was uncertain given that it depended upon the coming into force of the relevant provisions, that uncertainty was not about the event of dissolution but simply the timing and is not sufficient to render the notice provided to Ms. Maxwell anything less than clear and unequivocal.

[44] This finding is consistent with the policy objective identified by the authors of the England text, *supra*, in that it is clear that Ms. Maxwell was given sufficiently clear notice to enable her to consider her employment options, as evidenced by her written rejection of the employment offer with TRB.

[45] Ms. Maxwell points out that while the College was ultimately dissolved effective January 9, 2012, she was in fact terminated effective January 6, 2012. That was her last day at work as stipulated by Ms. Kennedy and Ms. Maxwell's employment records all reflect January 6 as the effective date.

[46] In my view however, that does not alter the fact that Ms. Maxwell's termination was brought about by the change in structure put in place under the *Act* and was not effected independently by Ms. Kennedy. January 9, 2012 was a Monday and January 6, 2012 was the preceding Friday. In the circumstances, when Ms. Maxwell indicated that she would not be taking up employment with the TRB, it only made sense that Friday, January 6, 2012 would be her last formal day of work at the College.

[47] Based on all of the above, I find that Ms. Maxwell was not terminated by Ms. Kennedy on December 12, 2011. Rather, her employment with the College ended as a result of the dissolution of the College under the *Act*.

### **SEVERANCE PURSUANT TO THE CONTRACT**

[48] Ms. Maxwell argues in the alternative that even if she was terminated by reason of the dissolution of the College pursuant to the *Act*, she nonetheless is entitled to the severance payment and related benefits provided for in the Contract. In response, the defendants argue that the provisions of the Contract would only be triggered in the event that the registrar terminated Ms. Maxwell's employment.

[49] The defendants rely on the language used in clause 1.02 of the Contract that appears to give authority to the registrar to effect a termination. For example, clause 1.02 (c), which deals with termination for cause, provides that "The Registrar, shall be entitled to terminate the Employee for cause without notice..." Similarly, clause

1.02 (d), which deals with termination without cause, provides that “The Registrar shall be entitled to terminate the Employee without cause provided that the Employer has been given reasonable notice...”

[50] Clause 1.02 (e), the severance payment provision, then goes on to say:

If the Registrar makes a decision to terminate the employment of the Employee without cause, the College shall provide an all-inclusive payment in lieu of notice, based upon the employee’s salary and the College’s cost of the benefits (which includes the College’s cost of pension contributions) that would have been provided to the Employee during the period of notice of the Employee at the time of termination.

[51] Counsel for the defendants submits that it is clear that the power to terminate employment rests with the registrar as part of his or her normal responsibilities for the day to day management of the College. In his submission, the entitlement to severance under clause 1.02 (e) only arises where termination of an employee occurs as part of an operational or management decision made by the registrar. It does not arise in the circumstances of this case where the termination was not a decision of the registrar but is the result of a policy decision made by government to replace the College with a new entity. Counsel for the defendants further submits that the Contract does not contemplate or cover the situation in which the government dissolves the College and that such dissolution should be viewed as essentially a frustration of the Contract.

[52] I disagree. In my view, the defendant’s interpretation of the relevant provisions of the Contract is unduly narrow and fails to accord with the intentions of the parties to the Contract.

[53] The interpretation of an employment contract is subject to the same principles governing the interpretation of contracts generally, namely that the words used must be interpreted in accordance with their ordinary meaning taking account of the agreement in its entirety. The object of the exercise is to discern the intentions of the parties at the time the contract was executed, by reference to the words used.

[54] As noted by the Supreme Court of Canada in *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888 at 901:

[T]he normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties.

[55] Similarly, the British Columbia Court of Appeal in *Gilchrist v. Western Star Trucks Inc.*, 2000 BCCA 70, articulated the proper approach to interpretation in these terms at para. 17:

The goal in interpreting an agreement is to discover, objectively, the parties' intention at the time the contract was made. The most significant tool is the language of the agreement itself. This language must be read in the context of the surrounding circumstances prevalent at the time of contracting.

[56] In addition to these general principles, the courts have acknowledged the importance of work to individuals and have adopted an approach to interpreting employment contracts that is intended to protect vulnerable workers. For example, in *Ceccol v. Ontario Gymnastic Federation*, (2001) 204 D.L.R. (4<sup>th</sup>) 688, the Ontario Court of Appeal noted at paras. 47 and 48:

**47** In an important line of cases in recent years, the Supreme Court of Canada has discussed, often with genuine eloquence, the role work plays in a person's life, the imbalance in many employer-employee relationships and the desirability of interpreting legislation and the common law to provide a measure of protection to vulnerable employees: see Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, Machtinger, supra, and Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701 ("Wallace").

**48** These factors have clearly influenced the interpretation of employment contracts. In Wallace, Iacobucci J. said, at pp. 740-41:

The contract of employment has many characteristics that set it apart from the ordinary commercial contract. Some of the views of this subject that have already been approved of in previous decisions of this court (see e.g. Machtinger, supra) bear repeating. As K. Swinton noted in "Contract Law and the Employment Relationship: The Proper

Forum for Reform", in B.J. Reiter and J. Swan, eds., *Studies in Contract Law* (1980), 357, at p. 363:

... the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.

[57] Here, the defendants advance a literal interpretation of the Contract by focussing on the references to the registrar in the termination provisions. However, in my view, that narrow literal interpretation is again inconsistent with the intent of the parties as reflected in the Contract as a whole.

[58] In considering the proper interpretation of clause 1.02 of the Contract, it is useful to note clause 1.01 which addresses the term of the Contract. Clause 1.01 states:

The employment of the Employee in the capacity of Director, Certification will continue from the date of execution of this Agreement until termination by either party pursuant to Article 1.02 (the "Term").

[59] Similarly, clause 1.02 (a) provides that "This agreement may be terminated at any time by mutual agreement of the Parties." Clause 1.02 (b) states "The Employee shall be entitled to terminate this agreement upon one (1) month written notice to the College."

[60] It is apparent from these provisions, and indeed from the Contract as a whole, that it is a contract between Ms. Maxwell and the College, not a contract between Ms. Maxwell and the registrar. Thus, if Ms. Maxwell were to be terminated for cause under clause 1.02 (c), or terminated without cause under clause 1.02 (d), the termination would be by the College. The registrar in his or her role as the senior employee of the College, is simply the agent through whom the decision is communicated.

[61] With respect to the defendants' argument that the Contract was effectively frustrated by the dissolution of the College, I note that it would have been open to

the legislature when enacting the *Act* to address directly the issue of compensation for affected employees and to legislate the Crown out of the severance obligation. The legislature did not choose to do so.

[62] The well-known decision of the Supreme Court of Canada in *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, is instructive on this point. In that case, the respondent was employed as a commissioner of the Public Utilities Board under the provincial *Public Utilities Act*. Following a government ordered review of the functions of the board, a new act was passed that restructured the board, reduced the number of commissioners and abolished the respondent's position. The respondent was offered a different position as a consumer advocate but he declined and sued for damages.

[63] The respondent's action was initially dismissed by the Newfoundland Supreme Court but he successfully appealed to the Newfoundland Court of Appeal which awarded him damages equivalent to two and one-half years of salary plus pension benefits. A further appeal by the province to the Supreme Court of Canada was dismissed.

[64] While the Supreme Court's decision is largely concerned with the contractual status of senior public servants, its discussion of the limits on the Crown's ability to abrogate its contractual obligations is helpful in the context of this case. Writing for the Court, Mr. Justice Major said at paras. 46 and 47:

In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to. In the absence of a clear express intent to abrogate rights and obligations-rights of the highest importance to the individual-those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord with the nation's understanding of the relationship between the state and its citizens."

...A contract of employment with the Crown remains binding unless and until it is explicitly displaced by statute. This follows *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101, which held that a statute is not to be construed so as to take away a person's property without compensation unless its wording clearly demand[s] it.

[65] Mr. Justice Major concludes at para. 55 by saying:

The Crown had a contractual obligation to the respondent, which it breached by eliminating his position. As his right to seek damages for that breach was not taken from him by legislation, he is entitled to compensation.

[66] The circumstances here differ somewhat in that Ms. Maxwell was not a public servant and her Contract was with the College not the Crown. However, the principle remains the same, namely that the Crown by legislation could not remove her contractual right to compensation on termination unless it did so expressly.

[67] It is useful to note that under s. 87(1)(b) of the *Act*, the legislature did choose to specifically rescind the appointments of all council members and members of various College committees and subcommittees. Further, in s. 87(3), the legislature expressly stated that rescission of such appointments must not be construed as a breach of any contract or agreement and that no legal proceeding for damages may be brought as a result of the rescission. Again, no similar provision was enacted with respect to employees of the College including Ms. Maxwell.

[68] It is apparent from reading the Contract as a whole, and clause 1.02 (e) in particular, that the intent of the severance provision was to provide Ms. Maxwell, as a senior management employee of the College, with a measure of financial security in the event that her employment was terminated. Absent a clear and express provision to the contrary in the *Act*, that intent, and the College's (now the Crown's) corresponding obligation, continue in force.

[69] Having concluded that Ms. Maxwell is entitled to severance in accordance with the terms of the Contract, the issue then arises as to the amounts due and owing to her.

[70] The defendants did not take issue with the fact that if clause 1.02 (e) of the Contract is applicable, Ms. Maxwell is entitled, based on her years of service, to the maximum amount of 24 months of salary totalling \$271,000. There is also no issue that under the Contract, the severance amount payable includes the College's cost of benefits. Counsel for Ms. Maxwell points to Ms. Maxwell's year end pay stub for

2011 which sets out total annual benefit costs of \$20,772.59 which, when extrapolated over the 24 month severance period, results in a total benefit cost of \$41,545.18.

[71] That amount however includes the College's contributions to the Pension Plan which I will deal with separately below. Subtracting the pension contributions from the above amount results in a total annual benefit cost, for benefits such as dental, life insurance, extended health and BC Medical Service Plan, of \$2,912.46, or \$5,824.92 for the 24 month period.

[72] Ms. Maxwell's claim for additional pension benefits is somewhat less clear. Under clause 1.02 (e), the amount payable to Ms. Maxwell includes the "College's cost of pension contributions" which I take to be the amount that the College would have paid into the Pension Plan on behalf of Ms. Maxwell during the applicable severance period. Based on Ms. Maxwell's 2011 year end pay stub, the annual contribution from the College appears to be \$17,860.13, which translates into \$35,720.26 over the 24 months.

[73] However, the Contract also provides in clause 3.05 (b):

Prior to any termination from employment the Registrar will permit the Employee to enter into an agreement which would extend the Employee's pensionable service for a period not longer than the payment in lieu of notice provided in Article 1.02(e). Agreement by the Registrar to such an agreement will not be unreasonably withheld.

[74] Ms. Maxwell submits that, properly construed, this provision entitles her to damages in an amount necessary to provide her with the equivalent monthly pension on retirement as she would receive had she continued in the Pension Plan for the 24 month notice period. Ms. Maxwell relies on the actuarial report of Michael Demner to quantify that amount.

[75] Mr. Demner is the president of Demner Consulting Services Ltd. and a fellow of the Society of Actuaries and the Canadian Institute of Actuaries. He prepared a report dated March 14, 2013 in which he calculates Ms. Maxwell's pension loss

resulting from her inability to continue to participate in the Pension Plan during the 24 month severance period contemplated by the Contract. As stated in his report:

The objective is for Beverley to receive the same after-tax income from her current pension, plus the income that can be provided from the BC College of Teachers payment, as compared to the net after-tax pension Beverley would have received had BC College of Teachers continued to credit Beverley with pensionable service during the 24-month notice period.

[76] In order to meet the stated objective, Mr. Demner's approach, in general terms, was to calculate the difference between Ms. Maxwell's monthly pension entitlement, including a bridge pension payable to age 65, as of her date of termination versus what the benefit would be had she continued in the Pension Plan and accrued pensionable service for the 24 month severance period ending December 31, 2013. He then calculated the lump sum payment required to provide the additional benefit amount, applied a discount rate for the purpose of determining present value and adjusted for the tax payable on the lump sum payment. Deducted from that amount is the value of Ms. Maxwell's contributions that she would have been required to make during the 24 month period (\$32,900) as well as the value of the pension benefits that Ms. Maxwell would have received had she retired at the end of the month of her termination date (\$91,800).

[77] In Mr. Demner's estimation, that results in a gross (before tax) amount payable to Ms. Maxwell in respect of her pension loss of \$164,500. This the amount claimed by Ms. Maxwell under this head.

[78] Having reviewed Mr. Demner's report and the methodology employed therein, I am satisfied that the figure of \$164,500 accurately reflects Ms. Maxwell's pension loss during the 24 month severance period in that it reflects the amount that Ms. Maxwell would need in order to obtain the same monthly pension and bridge benefits she would have been entitled to had she continued to accrue pensionable service for an additional 24 months. I note that the defendants did not adduce any expert actuarial evidence to counter Mr. Demner's report. Obviously, the defendants' primary response has been that the severance provisions of the Contract have no

application. Nonetheless, it was open to them to lead evidence challenging Mr. Demner's assumptions and calculations and they chose not to do so.

[79] However, my difficulty with Ms. Maxwell's claim under this head is not with the methodology employed to calculate the damage amount but rather with the premise underlying the calculation, namely that Ms. Maxwell is entitled to be compensated as though she had continued to participate in the Pension Plan and to accrue pensionable service for the 24 month severance period. In my view, clause 3.05 (b) of the Contract is not sufficiently clear to support that interpretation.

[80] Clause 3.05 (b) does not on its face provide for an extension of Ms. Maxwell's pensionable service under the Pension Plan. Rather, it simply directs that the registrar will permit Ms. Maxwell to enter into an agreement for such an extension. However, the clause does not identify with whom Ms. Maxwell would reach such an agreement. It would not be with the College or the registrar given that the College has no authority to determine eligibility for pensionable service. That is governed by the terms of the Pension Plan and decisions of the Plan's board of trustees. Likely, such an agreement would be with the Plan's trustees, however that is not clear from the wording of clause 3.05 (b) and there is no evidence that such an agreement is possible or would be acceptable to the trustees.

[81] Further, to permit Ms. Maxwell to recover damages on this basis would be inconsistent with clause 1.02 (e)(iii) of the Contract which provides that the total severance payment due to Ms. Maxwell "shall not exceed 24 months of salary and the College's cost of benefits (which includes the College's cost of pension contributions)". In my view, it is not open to Ms. Maxwell to claim entitlement to a severance payment under the Contract but at the same time ignore the cap on such a payment established by the Contract. Accordingly, I find that Ms. Maxwell is entitled to recover the amount that the College would have contributed to the Pension Plan on her behalf during the 24 month severance period. Based on Ms. Maxwell's 2011 year end pay stub, that amount is \$35,720.26.

**THE PLAINTIFF'S ENTITLEMENT AT COMMON LAW**

[82] Given my conclusion that Ms. Maxwell is entitled to the severance payment set out in the Contract, I need not decide what period of reasonable notice she would be entitled to at common law. However, I note that Ms. Maxwell and the defendants did not differ much on this point. Ms. Maxwell suggested 24 months' notice is appropriate whereas the defendants submitted that 22 months is reasonable. Given Ms. Maxwell's age at the date of termination, her years of service and the seniority of her position, I agree that she is entitled to a substantial period of notice that is at the high, but not necessarily the highest, end of the generally accepted range. In the circumstances, if the Contract did not govern, I would have found that 22 months is a reasonable notice period for her at common law.

**IS THE PLAINTIFF REQUIRED TO MITIGATE HER DAMAGES**

[83] The next issue that arises is whether Ms. Maxwell is required to mitigate her damages in light of my conclusion that she is entitled to a severance payment in accordance with the terms of the Contract. I agree with Ms. Maxwell that the answer to that question is no.

[84] The law in British Columbia is well settled that where there exists a contractual severance provision, a dismissed employee is entitled to the specified amount and is not required to mitigate absent a duty to do so imposed by the contract. That principle was confirmed by the Court of Appeal recently in *Allen v. Ainsworth Lumber Co. Ltd.*, 2013 BCCA 271 at para. 38, citing *Philp v. Expo 86 Corp.* (1987), 45 D.L.R. (4th) 449 (BCCA) and *Bowes v. Goss Power Products Ltd.*, 2012 ONCA 425, 351 D.L.R. (4th) 219. No such duty to mitigate is required by the Contract here.

[85] In the circumstances, I need not decide whether Ms. Maxwell's decision to decline employment with the TRB was unreasonable and amounts to a failure to mitigate.

**SUMMARY AND CONCLUSIONS**

[86] In summary, I find that Ms. Maxwell is entitled to recover from the defendants the severance amounts set out in the Contract, being \$271,000 in salary, \$5,824.92, representing the College's cost of benefits in the severance period, and \$35,720.26 representing the contributions to the Pension Plan that the College would have made during that period.

[87] Unless there are circumstances that I am not aware of, Ms. Maxwell is entitled to her costs at Scale B.

"Skolrood J."